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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. [illegible] 87

THE COCA-COLA COMPANY,
Petitioner,

v.

DIXI-COLA LABORATORIES, INC., *et al.*,
Respondents.

REPLY BRIEF OF THE PETITIONER.

HARRY D. NIMS,
EDWARD S. ROGERS,
HILARY W. GANS,
ROBERT B. TROUTMAN,
Counsel for Petitioner.

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IN THE

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No. 1059

THE COCA-COLA COMPANY,
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DIXI-COLA LABORATORIES, INC., *et al.*,
Respondents.

REPLY BRIEF OF THE PETITIONER.

Respondents are correct in saying that "certiorari will not be issued to reverse questions of fact."[1] But there are no disputed questions of fact in this case. The trial court's decision as to the facts was not reversed. We need not argue this, since respondents have admitted it in the most explicit terms. In their brief they say:

> "Moreover, on the important factual questions in this case there was concurrence in the findings of both the trial and the Appellate Courts."[2]

Where the trial court and the Circuit Court of Appeals have so concurred in their findings, only one question

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[1] Respondents' Brief, p. 8.

[2] Respondents' Brief, p. 36.

remains—What, as a matter of law, is the relief to which petitioner is entitled? Respondents recognized this when they said earlier in their brief:

> "The District Court's determination of infringement rested upon several erroneous conceptions of trademark law. * * * The determination of infringement being thus based upon these demonstrably clear errors, it was entirely within the province of the Circuit Court of Appeals to reverse."[1]

Thus respondents also admit that the reversal of the District Court by the Circuit Court of Appeals was based upon questions of law, not of fact. The same questions of law arise here for determination in the light of the facts as found.

Respondents do not—and in the face of these admissions cannot—attempt to deny the correctness of the findings of the trial court that the use of the accused names

> "was calculated and intended to deceive, and did and does actually deceive * * *,"

and that the acts committed by the defendant were

> "with the deliberate intent and purpose of appropriating plaintiff's good-will and causing defendants' product to be sold by the trade, and accepted by the consuming public, as and for plaintiff's product."

Nor do respondents challenge the conclusion of the Circuit Court of Appeals that the defendant's

> "Fraudulent conduct * * * has been established,"

and that

> "The evidence also justifies the finding that the bottled beverage made by bottlers from defendant's concentrate was passed off as COCA-COLA in various bars and taverns."

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[1] Respondents' Brief, pp. 35-6.

and that

> "The defendants were also fully aware of the use of the infringing word 'Lola-Kola' by bottlers, and indeed agreed to place this word on all packages of its concentrate sold to Lola-Bottlers Inc."

and

> "Under these circumstances it is a reasonable conclusion that the defendants have conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so."

To what extent should the respondents be enjoined under such circumstances? This court has said:[1]

> "Of course, a man is not to be protected in the use of a device the very purpose and effect of which is to *swindle* the public." (Emphasis throughout brief is counsels'.)

Respondents, in referring to their acts of unfair competition,[2] minimize the extent of their "swindle" by omitting to state much of their fraudulent conduct. Respondents' acts of fraud may be summarized as follows:

The scheme to defraud originated with the defendant Grivakis as far back as 1929. The plan was conceived in Canada where an officer of the respondent companies,[3] in cooperation with another, engaged in passing off an imitation product on calls for "Coca-Cola";[4] when this scheme was detected, the business was moved to the United States because it was believed that concealment would be easier.[5]

In the United States, respondents' officers succeeded in acquiring or organizing the corporate respondents;[6] the sole product of the respondents was a single concentrate and syrup which was sold under different names, but originated

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[1] *Coca-Cola Co.* v. *The Koke Co. of America*, 254 U. S. 143, 145.

[2] Respondents' Brief, p. 6.

[3] Constantine Grivakis, Vol. II 1227-1230.

[4] Vol. II, 1229-30.

[5] Id. 1231.

[6] Vol. II 834-5, 985-9, 1002-3, 1233-35.

from one source;[1] the respondents' product imitated petitioner's product "Coca-Cola" and was intended to be passed off for "Coca-Cola";[2] among the names used upon or in connection with the product were "Apola Cola", "Dixi-Cola", "Lola Kola", and "Marbert Cola".[3] The names "Apola Cola" and "Dixi-Cola" were chosen with the knowledge that they had been denied registration in the United States Patent Office on the ground that they were "confusingly similar to and a colorable imitation of" the trade-mark "Coca-Cola".[4] They were chosen with the knowledge also of the great popularity of petitioner's product and trade-mark. Asked why he had chosen the name "Apola Cola", the defendant Grivakis answered: "Because the public was cola-minded."[5] How he knew "the public was cola-minded" he said was, "Because when you go into a soda fountain you hear Coca-Cola, Coca-Cola; you see bottles around, you read reports that the Coca-Cola made twenty-five or thirty millions. Of course, it must sell extensively." "In other words," he was asked, "in 1929, you came to the conclusion that Coca-Cola was an extremely popular drink, did you not?" To which he answered, "Sure."[6]

At respondents' urging, retailers passed off respondents' goods as and for "Coca-Cola";[7] four hundred and eighty-two instances of actual passing off were established at the trial.[8] Respondents relied on the cheaper price of their

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[1] Vol. II 879-880, 904-5.

[2] Vol. II 1231, Vol. III 2174.

[3] Vol. I 437, Vol. II 840-1.

[4] Compl. pars. 21, 23 admitted by answer pars. 21, 23.

[5] Vol. I 54-55.

[6] Id.

[7] Vol. I 75-6, 79-80, 89-91, 138-9, 170, 171, 535-8, 558-9, 566-8, 586-91, 606-8, 617-8, 628-9, 640-3, 657-60, 675-7, 699-700, 706, 715-6.
Vol. II 1164-6, 1177-8.

[8] Plaintiff's Exhibit No. 35 (Vol. III 1575).

product as an inducement to this practice;[1] they used as containers barrels and jugs originally used for "Coca-Cola"[2] and bearing the trade-mark "Coca-Cola"; they adopted for use by themselves and their bottlers a color scheme in imitation of petitioner's color scheme,[3] and the bottler, constituting their principal outlet for "Dixi-Cola", changed the colors of the bottle caps to red on white,[4] which is petitioner's color scheme for its caps; respondents' representative talked to a prospective bottler "about the idea of selling it for 'Coca-Cola'" and "that people would think it was 'Coca-Cola' in a twelve-ounce bottle."[5]

The extent of respondents' dishonesty was acknowledged by the Circuit Court of Appeals when it said that respondents

> "conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so."

The effect of the Circuit Court of Appeals' decision was to protect a swindle and permit it to continue by refusing to enjoin all the means which made it work.

On this record the refusal of the Court to grant full relief in view of the concurrent findings of fraud and fraudulent intent, present legal questions of grave public concern, not only because the decision tends to lower the standard of commercial morality, but also because the reasons upon which it rests, and the legal philosophy underlying those reasons, are in conflict with established principles of the law of trade-marks and unfair competition.

Petitioner will present briefly several aspects of the decision which require review by this Court.

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[1] Vol. I 75-6 (same as footnote 7, page 4).
[2] Vol. I 155-7, 193-4; Vol. II 1238-9.
[3] Vol. I 201, 428-9; 447; Vol. II 1105-6.
[4] Vol. I 316-8.
[5] Vol. II 1167-8.

The opinion of the Circuit Court of Appeals shows a misconception of the principle underlying the remedy against infringement by misrepresentation and deception as to origin. The failure of the Court to apprehend that principle has resulted in a decision which is in direct conflict with an earlier decision of this Court establishing the measure of protection to be accorded to the trade-mark "Coca-Cola". That case dealt with issues of fact and of law so closely parallelling those in the present proceeding that it should be regarded as an authoritative guide to the award of proper relief here.

In *The Coca-Cola Company* v. *The Koke Company of America*, 254 U. S. 143, this Court adjudged:

(1) defendant guilty of fraudulent intent;

(2) the trade-mark "Coca-Cola" valid; and

(3) infringed by "Koke", but not by "Dope" because

> "It (Dope) does not suggest Coca-Cola by similarity * * *."

Mr. Justice Holmes, in commenting on the defendant's conduct, said (145):

> "It is found that defendant's mixture is made and sold in imitation of the plaintiff's, and that the word 'Koke' was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and of selling the imitation as and for the plaintiff's goods."

The decree held "Coca-Cola" to be a valid trade-mark. It also held that by using "Koke":

> "the defendants * * * have infringed the plaintiff's trade-mark, not, however, by the use of the word Dope * * *."

"Koke" was thus adjudged an infringement, but not upon the ground that it was a nickname for "Coca-Cola"

as respondents assert. If the decision had been upon that ground, "Dope", too, would have been enjoined, for "Dope" was as much a nickname for "Coca-Cola" as "Koke". But "Dope" was not enjoined because, "It does not suggest Coca-Cola by similarity * * *." Manifestly, then, "Koke" was enjoined because, being a simulation of "Coca", it suggested "Coca-Cola" by similarity.

Mr. Justice Holmes further said (146):

> "* * * Coca-Cola probably means to most persons the plaintiff's familiar product, to be had everywhere, rather than *a compound of particular substances.*"

Since the Court adjudged that the compound word "Coca-Cola" as applied to petitioner's drink does not mean a compound of the substances coca and cola, then neither "Coca" nor "Cola", in "Coca-Cola", means a substance. Consequently, as used in the trade-mark "Coca-Cola", or in an imitation of the name or on an imitation of the article, neither "Coca" nor "Cola" is descriptive. "Coca" and "Cola" are each equal parts of a valid trade-mark, and one is as distinctive as the other. Hence "Cola" as well as "Coca", when used as the name of a beverage made in imitation of complainant's, "by similarity" suggests and means "Coca-Cola".

The respondent, in the *Koke* case, said at p. 142 of its brief before this Court:

> "Plaintiff's trade-mark rights, if it has any, are in the combination, 'Coca-Cola' and not in either the word 'Coca' or the word 'Cola' considered by itself. Unless plaintiff can show an exclusive right to the word 'Coca,' it certainly cannot complain of defendants' use of an abbreviation of that word, or of a word having a sound resembling the first syllable thereof.
>
> * * * * *
>
> "But, here, again, the alleged infringement is not of the combination, but only of a publici juris element of that combination."

In the case at bar, respondents are making the identical contention with respect to "Cola", notwithstanding that, in the *Koke* case, it was rejected. The case here with respect to the asserted generic character of "Cola" is much weaker than was the similar contention with respect to "Coca" in the *Koke* case. Respondents, therefore, seek to bolster their argument here by asserting that in the *Koke* case petitioner conceded that "Cola" is a generic term. Respondents say that this concession distinguishes that case from this.

But petitioner's brief in the *Koke* case made no substantial distinction between "Coca" and "Cola". Referring to beverages like those of the parties to that case, petitioner said:

> "* * * they were known by the trade and by the public as *coca*, or more generally as *cola* drinks." (Quoted in respondents' brief opposing the writ in this case, p. 22.)

Yet, because of the imitation of "Coca-Cola" by "Koke", plus the defendant's fraud in the adoption of a name which suggested "Coca-Cola" by similarity, this Court adjudged "Koke", a simulation of "Coca", an infringement, and affirmed the decree of the District Court for the District of Arizona which enjoined the use of

> "the word 'Coca-Cola' or any like word, or the word 'Koke' or any like word."

The *Koke* case thus established that where a defendant is guilty of fraudulent intent (as was there expressly held and here is found by both the trial court and the Circuit Court of Appeals), it is immaterial that the instrument of the fraud may be a generic term, and that any term the use of which results in deception of the public will be enjoined if it suggests, by similarity, the trade-mark sued upon.

Here we should suppose that as "Cola" also suggests "Coca-Cola" by similarity, and as the respondents' fraud

was found by both courts below, the same relief should be decreed. To show how close is the parallel with the present case, we need only contrast the manner of displaying "Koke" in the *Koke* case, and "Cola" in this, and compare each with petitioner's trade-mark.

Petitioner's trade-mark held valid in the *Koke* case and in this.

Respondents' mark in the *Koke* case which this Court enjoined because it suggests Coca-Cola by similarity.

One of the respondents' marks in this case which the Circuit Court of Appeals refused to enjoin, although it equally suggests Coca-Cola by similarity.

If briefs of the parties in the *Koke* case are to be regarded as of any significance here, they establish the identity of issues in this case and in that. The only difference is that in the *Koke* case the first syllable of "Coca-Cola" was involved, while here the second syllable is being used by respondents for the same purpose for which the defendant in the *Koke* case used the simulation of the first syllable—in Mr. Justice Holmes' language, it was chosen "for the purpose of reaping the benefit of the advertising done by the plaintiff and of selling the imitation as and for the plaintiff's goods."

In this case the Circuit Court of Appeals said that "fraudulent conduct" by these respondents has been established: that respondents' product was sold "in the fountain trade, with the understanding that the drink made therefrom should be sold as and for Coca-Cola," and that the bottled beverage "was passed off as Coca-Cola in various bars and taverns." The Court found it a reasonable conclusion that respondents "conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so." But the Court made it safe for respondents to do so by permitting them to use on their goods, names which, to use Mr. Justice Holmes' phrase, "suggest Coca-Cola by similarity."

In the *Koke* case, the result of the finding of such fraudulent conduct was a decree enjoining the defendant's infringement of "Coca-Cola" by "Koke". The reasons which moved this Court to affirm such a decree apply equally to the infringement of "Coca-Cola" by "Cola" and names containing it.

Respondents refer to the *Roxa Kola* case (*The Coca-Cola Co.* v. *Carlisle Bottling Works,* (C. C. A. 6) 43 Fed. (2d) 119),[1] and *Pepsi-Cola Company* v. *The Coca-Cola Company,* in the Supreme Court of Canada (now pending in the Privy Council). These cases differ from the *Koke* case and from this in an important respect. In neither was there any finding of fraudulent intent or deceptive consequences of the defendants' acts.

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[1] The Court which decided the *Roxa Kola* case had this to say about it in *The Hemmeter Cigar Co.* v. *Congress Cigar Company,* (C. C. A. 6) 118 Fed. (2d) 64, 69, where Judge Martin observed:

> "With reference to the authorities which we are about to cite or quote, we would repeat the words of this Court: 'Reported cases are helpful only in so far as they lay down general rules of decision. The question of infringement must be determined upon the particular facts of the case in hand.' Coca-Cola Co. *v.* Carlisle Bottling Works, 6 Cir. 43 F. 2d 119, 121."

The only difference between the *Koke* case and this, is in the conclusion which the Circuit Court of Appeals failed to draw from nearly identical facts. In the *Koke* case this Court regarded as pertinent to the issue of infringement, defendant's fraudulent purpose to pass off its goods as "Coca-Cola". In this case the Circuit Court of Appeals found the same fraudulent purpose to pass off, but gave it no effect.

It erroneously disregarded the respondents' fraudulent intent in arriving at its conclusion that they had a legal right to use the marks by which this intent was carried out. The trial court enjoined the means by which respondents' purpose was made effective. The Circuit Court of Appeals, in reversing the decree, allowed to continue, the acts which made respondents' fraudulent intent effective, on the mistaken theory that there is some rule of law which prevents a court of equity from giving adequate relief against intentional fraud. We suggest the applicability of Lord Macnaghten's remark in *Nordenfelt* v. *Maxim Nordenfelt Co.* (1894) L. R. App. Cas. 573:

> "It is a public scandal when the law is forced to uphold a dishonest act;"

The issue in the courts below was, we submit, the character and conduct of the defendants before it. They were concerned only with the wrong the respondents were committing against petitioner and the public in the light of the motive which prompted it. A decree was entered by the District Court which effectively put a stop to the fraudulent acts respondents were shown to have committed and prevented their repetition. This, we suggest, was proper. A decree should always be drawn to meet the situation the record discloses and adjusted to the particular circumstances of the case (*Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 292; *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, 461). The Circuit Court of Appeals ignored this

principle. It seems to have entertained the notion that it was not called upon to decide the specific and concrete controversy between the parties, but to legislate for the beverage trade at large.

Possibly in taking this attitude the Circuit Court of Appeals was misled by the several *amici curiae* who volunteered their views in general without being hampered by the record. Possibly, too, the Court could not perceive the distinction between the right to protect a trade-mark against fraudulent imitation and the right to monopolize a word completely. Most certainly one element in its attitude was its wholly erroneous premise that

> "The plaintiff concedes that the names Dixi-Cola and MarBert the Distinctive Cola are not so similar to the name Coca-Cola that a purchaser * * * would be led to believe that he was buying the beverage Coca-Cola * * *."

There was no such concession. The proof in the record is to the contrary. The use of such a mistaken statement of the petitioner's position undoubtedly contributed to the failure to give effective relief.

A controversy in this case has arisen over the amount of protection accorded petitioner's mark by the Circuit Court of Appeals. In its original petition, petitioner pointed out, as an error of law, the Court's refusal to protect petitioner's valid mark against colorable imitations, and in holding that protection should be given only against the "use as a whole" of the mark.

Respondents in their brief deny this contention and support their position by this statement from the opinion:[1]

> "In reality, there is no important difference between a trade name and a trade mark with respect to the

[1] Opinion, R. 2162.

> protection afforded by the courts to the exclusive right of the owner to use it to denominate his goods."

The Circuit Court of Appeals did not measure petitioner's right to relief by the rule thus stated, but by a less favorable one.

In fact, this statement of the Court presents one of the several confusing paradoxes to be found in the opinion.

At another place in its opinion, the Court said:[1]

> "A vigorous contest has arisen in this case as to whether the name Coca-Cola is in reality a *technical trade-mark, entitled to the widest protection, or* is a descriptive name which through long years of use and extensive advertisement has acquired a *secondary significance.* So far as the validity of the trade-mark and the right of the plaintiff to prevent its use as a whole by any competitor are concerned, the issue is unimportant."

It will be noted that the Court concedes to a name "which * * * has acquired a secondary significance" the right "to prevent its use as a whole." The Court, however, does not concede to the owner of a name "which * * * has acquired a secondary significance" the right "to prevent its use" other than "as a whole". The Court does not include within the orbit of its protection of such marks the right "to prevent" colorable imitations. A colorable imitation is not merely the reproduction of the mark "as a whole", but in the language of the Trade-Mark Act is any name "which so nearly resemble(s) a registered * * * trade-mark * * * as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers * * *."[2]

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[1] Opinion, R. 2161.

[2] Trade-Mark Act of Feb. 20, 1905; § 16 (U. S. C. Tit. 15, § 85); *Century Distilling Co.* v. *Continental Distilling Corp.*, 23 Fed. Supp. 705 (D. C. E. D. Pa.); aff'd. 106 F. (2d) 486 (C. C. A. 3).

The Court further said:[1]

> "No one else can lawfully use the word 'coca-cola' for a trade mark, even though it originally may have been a descriptive name.
>
> The plaintiff, however, *is not content with this measure of protection.*"

Here, again, the Court dealt with the "measure of protection" to which petitioner's mark is entitled both at common law and under the express terms of the statute. And here again the Court measures that protection by limiting it to the use of the "word Coca-Cola", and ignores the right to be protected against colorable imitations of it.

In view of what follows later in the opinion, it should be noted that the Court concedes protection to the "word Coca-Cola * * * even though it originally may have been a descriptive name." We conclude, therefore, that in the Court's view of the law the question of whether the trade-mark originally "may have been a descriptive name" qualifies the amount of protection to which the mark is entitled, both under the statute and at common law.

This fact becomes increasingly clear when we examine that part of the opinion and the conclusion based thereon dealing with the evidence of alleged descriptiveness. On the question of descriptiveness, the Court discussed in detail and at length the old Pemberton label, the kola nut literature, and similar matters which were before this Court in the *Koke* case.

Upon this evidence the court below said:[2]

> "It must be concluded, we think, from this history that the word 'Coca-Cola', taken as a whole, is in some sense descriptive of the drink which it designates."

In the *Koke* case, this Court in speaking of "Coca-Cola" said:

> "It means a single thing coming from a single source, and well known to the community."

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[1] Opinion, R. 2162.
[2] Id. R. 2168.

The conclusion of the Circuit Court of Appeals on the question of descriptiveness is, therefore, in conflict with the decision in the *Koke* case, and is irrelevant to the question of petitioner's rights in this case.

But that conclusion is the foundation stone upon which the Circuit Court of Appeals arrived at the decision that the petitioner was only entitled to protection against the use of its trade-mark "as a whole" and not against colorable imitation.

Another part of the opinion where it is apparent that the Court failed to deal with the question of colorable imitation is this statement:[1]

> "The District Judge concluded that these registrations were valid, but it is not necessary for us to decide the point here for, as the judge also held, the substantive rights under a trade mark are not dependent upon or affected by registration, and its secondary, as distinguished from its primary significance, is still open to question."

Here the court expressly refused to pass upon petitioner's statutory rights as the owner of a registered trade-mark.

The Trade-Mark Act of 1905 grants to owners of registered trade-marks relief not only against their "use as a whole", but also against the use of colorable imitations even though the mark may originally have been descriptive (*Thaddeus Davids Co.* v. *Davids*, 233 U. S. 461).

The reason assigned by the Court for its failure to pass upon petitioner's statutory rights in its trade-mark is that the trial court held that the substantive rights of the owner of a trade-mark are not "dependent upon or affected by registration." This statement may be questioned with respect to a mark registered under the ten-year proviso.[2] This Court has said that when registration was expressly permitted by the statute, "it was not the intention of Con-

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[1] Opinion, R. 2160-61.

[2] One of the registrations of "Coca-Cola," No. 47,189, is under the ten-year proviso.

gress thus to provide for a barren notice of an ineffectual claim, but to confer definite rights." (*Thaddeus Davids Co.* v. *Davids,* 233 U. S. 461, 469.)

The underlying reason of the Circuit Court of Appeals for cutting down the substantive rights which the District Court accorded petitioner's trade-mark rested upon the ground that petitioner's mark is a secondary meaning mark and is only entitled to protection to "its use as a whole". This is clearly erroneous (*Thaddeus Davids Co.* v. *Davids,* 233 U. S. 461; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.,* 305 U. S. 315). The Court continues to forget that the statute protects against colorable imitations of registered trade-marks as well as counterfeits and copies.

Respondents take issue with petitioner's contention that the Court erroneously applied Section 735(1) of the Restatement of the Law of Torts to this case.

Petitioner contends that that section has no application to a case in which a mark is upheld, and points out that the decisions upon which the Restatement rests are cases in which the marks have been held invalid.

Respondents on page 31 of their brief say:

> "Petitioner contends at p. 36 of its brief that this section of the Restatement 'can have no application to a case such as that at bar where the Court has specifically held that the trade-mark is valid.' This is typical of the reckless assertions of the petitioner. The Court below left open the validity of the petitioner's trade-mark and did not hold it to be valid (R. 2160-2162)."

Here we have a direct conflict as to the meaning and interpretation properly to be given the decision of the Circuit Court of Appeals. Petitioner contends that the Circuit Court of Appeals upheld the mark "Coca-Cola", but erred because it failed to give it the protection to which a valid

mark is entitled. Respondents deny that the court below upheld the mark and accuse petitioner of "reckless assertions" for saying so.

Certainly a decision that is subject to such wide differences in interpretation needs review by this Court lest the judges and the Bar become confused thereby and the rights of others be imperiled.

The court below ignored the fact that both the statute and common law protect trade-marks against colorable imitation. By the supposed "concession" of non-infringement mistakenly ascribed to petitioner—a mistake which the court declined to correct after the petition for rehearing called attention to it and pointed out that no such concession was made—and by the statement that petitioner is not content with "this measure of protection"—protection against counterfeiting the mark in its entirety—the court forced petitioner into the position of appearing to claim a monopoly in the word "cola" in gross and at large. No such monopoly was ever asserted.[1] What petitioner claims against respondents is best expressed in the language of Lord Justice James in *Levy* v. *Walker*, L. R. 10 Ch. D. 436, 447:

> "* * * the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say, somebody has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent, or is calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, de-

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[1] The District Court's decree expressly permitted respondents to state on their containers and labels and in their advertisements that their product contains extract of coca leaves or extract of cola nuts, if such is the fact (R. p. 1554).

> prive me of the profits of the business which would otherwise come to me.' That is the principle, and the sole principle, on which the court interferes."

Upon the record, and equally upon the respondents' own admissions, the petition for certiorari presents a definite and important question of law. This Court is asked to review a decision which is in serious conflict with the principle established and followed in earlier cases. Whether the distortion of the situation by the Court below arose from misapprehension of the legal effect of the uncontroverted facts, or from misconception of the law applicable to such facts, or simply from some apparent mistrust of petitioner's motives in seeking relief, the result is a reversal of what has hitherto been regarded as a basic principle of law—the right of every person to be protected against fraud.

We ask, therefore, that the petition for certiorari be granted.

Respectfully submitted,

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